COMMUNICATION

ARE FOODSTUFFS CONTRABAND OF WAR?

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The question of contraband still presents difficulties to the nations of the present day. The different views which they hold regarding it often are inconsistent. England takes the position that articles other than arms can be treated as contraband. Not until recently has she been willing to consider foodstuffs contraband only when they are intended for military uses. From the beginning France has considered nothing contraband unless it has a use for war. In 1900 Russia published a list of contraband from which foodstuffs were excluded. She maintains this position although the strong influence of Great Britain and the United States has sometimes caused her to do so. The United States has long recognized that food, unless for a military use, can never be regarded as contraband. It is almost universally agreed that, under certain circumstances, provisions, which are ordinarily innocent, can be condemned as contraband goods.

The position of the leading nations is most definitely stated in the declaration of London which contains the modern international law of contraband. It was drawn up by the naval conference in 1909 at which were represented Germany, United States, Austria Hungary, Spain, Great Britain, Italy, Japan, Netherlands, and Russia. All articles are divided into four classes and are absolutely contraband, conditionally contraband, not contraband, or those which may be made contraband by special declaration of the belligerent.

Articles absolutely contraband are those which are used principally for military purposes. This class also includes saddle, draught, and pack animals which are suitable for military operations. Articles conditionally contraband are those which are susceptible to military uses. They include foodstuffs, forage, clothing suitable for soldiers, gold and silver, vehicles, vessels, flying machines, fuel, powder not specially prepared for war, telegraphs, telephones, and

materials for building railways. Articles not contraband include raw materials of the textile industries, rubber, metallic ores, paper, agricultural and textile machinery, precious stones, and furniture.

It is interesting to notice the positions that the nations have taken on the question of contraband in previous wars. England, in 1597, refused to allow the Poles and Danes to furnish Spain with provisions because she wanted to reduce Spain by famine. In the Napoleonic Wars she considered foodstuffs occasional contraband and she seized food supplies going to France but she paid an indemnity for them. During the Franco-Chinese War, however, she protested because rice had been declared contraband. During the Boer War she seized provisions even though she had no evidence that they were to be used for military purposes. When provisions were declared to be unconditionally contraband in the Russo-Japanese War she uttered a protest.

France, in 1794, decreed that no articles should be considered contraband unless so specified in the treaty of 1778. During her war with China, in 1885, she claimed the right to seize cargoes of rice destined for any port north of Canton. Germany, in the War of 1807, applied the doctrine of occasional contraband. Russia, at the outbreak of her war with Japan, declared foodstuffs absolutely contraband but the protest from other nations caused her to modify her declaration so as to make them contraband only when destined for use in war.

The United States strongly protested when Great Britain, during the Napoleonic Wars, declared as contraband provisions destined for French ports. In the War of 1812 she considered as contraband a cargo of grain, on a Swedish ship, bound for a neutral port but for the use of the British fleet. During the Civil War she maintained the doctrine of occasional contraband. In the Spanish War she considered provisions conditional contraband. During the Boer War she held the view that foodstuffs should not be contraband merely because they were capable of being used by an enemy. During the Russo-Japanese War she emphatically denied the doctrine that foodstuffs can be deemed absolute contraband and again strongly maintained that they can be contraband only when destined for military uses.

The difficulties that have arisen in connection with contraband have resulted not so much from an effort to determine what is the

nature of contraband as from the effort to determine what articles shall be placed on the contraband list. That this difficulty should exist can readily be appreciated when it is remembered how varied are the commercial and industrial interests of the different nations. It is frequently heard that an article is either contraband or it is not contraband. Without further limitations and restrictions the statement is not accurate. Those who make such a statement consider only the material character of the article. In addition to this, in considering contraband, inquiry must be made as to the use to which the article is to be put. In fact, the latter is the more important consideration of the two. It is true that a certain grain is wheat or it is not wheat. It is true that the discharge of a rifle is the discharge of a rifle. But there is a difference whether it is aimed at a target or at a human being. So in determining the contraband character of goods. It cannot be said whether wheat is contraband until it is learned to what uses it is to be put. This difficulty presents itself in attempting to arrive at a contraband list.

The circumstances which make a particular article contraband must also be defined. When the circumstances of a particular instance are known, a definite conclusion should be forthcoming as to whether the article is contraband. Its previous doubtful character should lose significance.

An examination of various treaties shows that it is impossible to compile a definite list of contraband articles. The same difficulty is experienced when the opinions of leading writers on the subject are consulted. Generally speaking it may be said that the nations have followed one of two leading tendencies. One is championed by England who favors a long list of contraband with stringent enforcement. The other is championed by France, Germany, and Italy who favor a short list of contraband with more lenient enforcement.

What conditions are necessary to constitute contraband? In other words, what tests may be applied to determine whether the belligerent is being injured by trade between its enemy and foreign nations which does not exist in time of peace? In some instances the harm to the belligerent has been measured by the size of the trade. If it was small the presumption existed that it was the ordinary amount that had been carried on during the time of peace. If, on the other hand, it was large it was presumed that the war had created addi-

tional demands as a result of which the trade was large. This, of course, is not a sound basis upon which to form conclusions as can be seen by an examination of export and import statistics which show that even in time of peace different years often present great fluctuations.

Whether the trade is regular or irregular is a more satisfactory basis from which to judge. It might be regular both as regards the character of the goods and the source from which they are received. If different kinds of supplies are received during war than in peace periods it is reasonable to assume that the war created a new demand.

The satisfaction of this new demand may then be said to be a direct aid in time of war and probably the enemy should be allowed to prohibit it. The same principle applies as regards the source from which the goods are received. If the belligerent receives supplies from a nation in time of war with which it had no dealings in time of peace it is safe to assume that the war created a new demand the supply of which aided directly in war and probably the enemy should be allowed to take steps to prevent such trade.

In considering the source of supply another element should receive attention, namely, the place where the products were grown. If sent from a country in which they were grown they would more readily be considered innocent than if sent from one in which they were not grown. The former would be considered a natural manner of trading while the latter would be considered unnatural. Such a conclusion rebukes the theory that one nation should act as middle man for other nations.

Another test applied has been the condition of the goods. Raw goods are more liable to be innocent than manufactured ones. This is one of the elements to be considered in determining contraband character. While the distinction may appear to be far-fetched there is at least some justification for it. Effort expended in manufacturing an article may be considered as effort expended in aiding an enemy at the expense of the other belligerent.

Probably the most important test is the destination to which the goods are to be sent. In fact, many writers have considered only two elements in the discussion of contraband, the contraband character and the hostile destination. When articles are sent to such places where they will aid a belligerent the enemy has the right to interfere in order to strengthen its own position. The destination

determines almost directly whether an advantage is being given to the belligerent.

That this fact has been recognized as being true by the various nations is shown by the methods employed at different times to conceal destination. Circular tours and pretended voyages have been resorted to in order to deceive the enemy. Even the ship's papers have often been altered to meet the emergency.

While the immediate destination is the primary test yet the eventual destination is also taken into account. It is right that this should be the case. Ultimately the belligerent, so far as warfare is concerned, will secure an equally great advantage whether the goods are received directly or indirectly. The injury to the enemy will be the same in either case. Were the rule otherwise the primary object of the whole law would be defeated.

In this connection it is well to inquire how far the voyage may continue before contraband takes place. It is clearly established that no offense can be committed by selling or transporting goods within neutral territory. This is entirely permissible so long as the frontier line of the neutral is not crossed. Such a policy of the law maintains the position of the neutral. Otherwise the rights of neutrality would be lost. After the goods have crossed the frontier the question as to the hostile destination arises. The offense of carrying contraband is completed with the deposit of the contraband cargo at the belligerent destination. But with this we will deal later in considering the proceeds of contraband goods.

An examination of these various tests shows that the determination of contraband depends ultimately upon the circumstances of each case, the character of the cargo, and the hostile destination. It also shows that generally anything which is helpful to the enemy will be contraband. It follows from this that arms and munitions of war are always contraband. Foodstuffs may or may not be.

Not only has there been much discussion as to what constitutes contraband but there has been also a disagreement as to what agencies should determine that question. Some believe that the law of nations should govern while others think the question should properly be decided by conventional law. To determine the relative merits of each is much the same as determining the relative merits of common and statute law. In the latter case, however, the decision and statute may occur in the same jurisdiction. In the former they

may be pronounced not only in different jurisdictions but under conditions entirely different so far as the material, civil, or moral is concerned.

The law of nations is unsatisfactory essentially because it is made in time of war. The impassioned desire for gain, the confusion of conflict, and the heat of excitement are undesirable elements which should not entertain men who are engaged in making laws. Often the measures presented are the result of entirely irrational acts.

There is a second reason why the law of nations is unsatisfactory. Even should there be a most deliberate consideration of a case in question, the unsettled conditions and the many unnatural and extraordinary situations requiring attention make it very difficult to render a satisfactory decision. The positions and interests of the various nations are not always properly understood.

A final reason why the law of nations is not satisfactory is because the interpretation of it is often left to a few individual writers. Even though they do become recognized authorities they may not represent popular justice. Their reputation may have been gained merely because they more nearly do so than others. A writer limited largely by national influences is not always able to announce a correct decision influencing international interests.

The conventional law is doubtless a means of more accurately arriving at what is justice in international law. It requires no proof to show that this is true. In fact, experience already has proven it. In national as well as in international affairs there has been a constant tendency to codify the law in order that the uncertainties of interpreting judicial decisions may be abolished.

The decisions are in conflict as regards the liability of seizure of the proceeds of a contraband cargo. A further analysis of the theory justifying the seizure as contraband would also justify the seizure of the proceeds. When contraband goods are seized no harm has been done to the enemy but the very fact that harm was intended justifies the enemy in taking the cargo in order tosecure itself for the future. Let us assume that contraband goods were actually delivered to the belligerent but that they proved to be of no harm to the enemy. The enemy seizes the proceeds. Under the theory just mentioned it would be justified in doing so in order to secure itself for the future. The proceeds if not taken would be used to produce more contraband goods thus jeopardizing the interests of the enemy. The case just

assumed forces a distinction between the proceeds of a contraband cargo which actually harms the enemy and one which does not. Probably few courts would recognize such a distinction. But, as already stated, some courts would not allow the seizure of the proceeds even though the cargo which they represent actually harmed the enemy. That was held to be the law in the case of the *Imina*. The ground of the decision was based upon the previous law of nations. The case of the *Margaret* is squarely contrary to this. Here a vessel had carried contraband from Baltimore to the Isle of France. After performing different voyages it sailed from Batavia to return to Baltimore. Three years had elapsed between the going and return voyage. The court held that she could be condemned, together with her cargo. This is a notable decision because of the extreme views which were held. Not only had the vessel performed other voyages on the same trip—her mission was not solely to carry contraband goods—but was returning from a different port than that in which the contraband goods were deposited. In the case of the *Nancy* the views of Lord Stowell were not nearly so extreme. He held that the proceeds could not be taken unless "the outward and homeward voyages are really but parts of one transaction." Under the present law proceeds would ordinarily not be liable to seizure.

The study of the question of contraband presents a clear but difficult issue with which to deal. The claims of the belligerents, on the one hand, and of the neutrals, on the other, are generally admitted. Belligerents are justified in suppressing any aid which may be given to their enemies. They have a right to use legitimate methods to protect and strengthen their own position and to weaken that of the enemy. Neutrals, on the other hand, which have in no way caused the war, have a right to continue their business without interruption and losses. In 1793, when England had issued an order to capture all ships carrying property belonging to French subjects, American trade was seriously hampered. Owners refused to allow their ships to be sent out, prices fell, labor was out of employment, and general business disruption resulted. That neutral nations should not be injured in this way is clear. The position of the neutral is not secure so long as an article can be placed on the contraband list by the mere declaration of a belligerent. Certainly a single sovereign should not be allowed to exercise such authority at the expense of other nations.

To declare all goods contraband entirely protects the belligerent. To declare all goods free of contraband entirely protects the neutral. Some compromise must be effected. Both parties with opposing interests cannot be protected. There is a growing tendency to allow conventional law to dictate what methods of compromise shall be adopted. Probably the most important feature of compromise up to this time has been the stipulation that the belligerent be required to compensate the neutral for such contraband goods as are seized. Probably no more satisfactory method of solving the problem will soon be found. It is, however, not entirely satisfactory. The most liberal allowance that has been offered is the market price, plus cost and freight and a reasonable profit. Ordinarily this will not fully compensate the neutral for war prices are often higher than market prices. Many difficulties are presented in determining what is a fair market price and what is a fair profit. The position of the neutral will be strengthened by allowing it to appeal its case to an international prize court.

While a neutral power may not supply contraband goods to an enemy in time of war yet its subjects may do so. It is sometimes said that a duty should be placed upon the neutral to prevent such shipments. But statesmen are not in sympathy with such proposals. They believe that the neutral should not be burdened by such obligations, that the belligerent, which is liable to suffer, should bear the burden. The law of nations has considered the position of the neutral to be a passive one. It has charged the interested parties with enforcing such claims as they might make, allowing them to inflict certain punishments for violations of their rights. Neutral powers do not attempt to prohibit their subjects from trading in contraband goods.

There is a reason why the government should prohibit its subjects from carrying on such trade. The neutral professes to be a friend to both belligerent powers. If it aids one a wrong is done to the other. If a subject furnishes the aid a similar wrong is done. If the neutral has the power to prevent it and does not, it must itself be considered guilty of the wrong. It should exercise the initiative just as it is compelled to do in preventing the enlistments for foreign armies on its own land. If the latter obligation is enforced by penalty why should not the former be?

There is also a reason why the government should not prohibit its subjects from carrying on such trade. It could not be prohibited

without considerable expense. The neutral should not be compelled to bear this burden inasmuch as the war was started without any fault of its own. It is very difficult for a nation to suddenly attempt to closely watch trade in time of war when it has not been accustomed to do so in time of peace. Should the neutral power attempt to perform such a duty it would doubtless cause many restrictions to be placed upon the innocent trader in order that it would be sure to restrict the guilty one. The neutral power should not be placed in a position where it must discriminate against an innocent subject.

It is lawful for merchant vessels of either belligerent to supply themselves in a neutral market with contraband articles. Neither moral nor legal principles discourage the legitimacy of such a policy. It is a purely commercial proposition.

The principal reason for such an established policy and the main argument which supports it are found in the fact that there can be no contraband trade in neutral waters. Contraband goods are not liable to seizure until the neutral frontier has been crossed and they are upon the high sea. Here again the neutral is allowed to pursue a passive policy leaving the enforcement of the law of nations to be executed by the parties in interest.

There is also an argument against such a policy. A neutral should be required to acquaint itself with the actions of its subjects. If it finds evidence that its subjects are aiding a belligerent which in turn will harm a friend the neutral is bound to become active in protecting the friend, or at least in preventing such acts which will help a belligerent. Only by pursuing such a course can international suspicions be avoided. If contraband articles cannot be furnished by a neutral to a belligerent on the high sea why should it be allowed to do so at its port? The ultimate result may be practically the same.

It is an established rule of international law that a neutral cannot interfere in behalf of its subject whose contraband goods were seized by a belligerent. The reason for this is that the neutral is presumed to occupy a passive position in all contraband matters. Just as it is not bound to prevent its subjects from dealing in contraband goods so it is not allowed to help them when such goods have been taken. When the neutral advises its subjects as regards goods that have been declared contraband it also warns them that any dealing in them will be carried on at their own risk.

Some of the particular circumstances should be determined

which have caused foodstuffs to be placed in a class more or less by themselves so far as contraband is concerned. There is a wide difference of opinion as to whether foodstuffs ever ought to be considered contraband of war and if so under what circumstances. The general rule is that if goods aid an enemy they are contraband. Food supplies aid an enemy as much as do arms yet the latter have always been considered contraband while the former have not. War consists primarily in killing the enemy which can be done by an empty stomach as well as by a bullet. Why should foodstuffs not be contraband?

War consists also in guarding against being killed. By depriving the enemy of food its style of fighting—if it can continue to fight at all—becomes much less aggressive. Here again it would seem that foodstuffs should be classified as contraband goods. The belligerent without food must cease to fight. The neutral which supplies the besieged belligerent with food is obligated to the enemy for the loss which it sustains thereby.

The question arises whether an enemy, endangered by famine, may strengthen its fighting position by the seizure of foodstuffs bound to a belligerent. If this is done the enemy becomes active not against the belligerent but against a neutral power. To seize neutral goods for its own immediate use is practically starting hostilities against the neutral. Such actions have, however, already been justified under a rule of necessity but the validity of the rule would probably not be sustained at the present time.

The many complicated issues involved in the doctrine of contraband have made it difficult to compile a complete and definite list of contraband articles. Modern methods of warfare tend to make the list a changing one. Early treaties between leading nations definitely provided that goods pertaining to the nourishment of mankind were not contraband. In recent treaties the nations have been inclined to modify their former positions and have classified foodstuffs with much hesitancy. Many inconsistencies are found because the commercial and industrial interests of the nations differ so widely and because the viewpoint of a neutral is different from that of a belligerent.

Any contraband lists that may be compiled by conferences, from time to time, will be influenced by the prevailing view that provisions, which are ordinarily innocent, may be considered as

contraband when they have a hostile destination. The legality of this principle is recognized by most writers.

The nations are almost universally agreed that articles absolutely contraband may be taken when they are being transported to the territory of the enemy and that they are not protected from seizure by the fact that they are to be transshipped from their immediate to their final destination. Articles conditionally contraband may also be seized when they are being sent to the enemy but the doctrine of continuous voyage does not apply.